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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DEERBROOK PAVILION, L.L.C.,
Petitioner,

VS.

DONNA E. SHALALA, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Parties And Corporate Disclosure Statement

The parties to this action are:

Petitioner – Deerbrook Pavilion, L.L.C.

Respondents – Donna E. Shalala, Secretary, U.S. Department of Health & Human Services

United States Department of Health and Human Services

Nancy-Ann Min DeParle, Administrator, Health Care Financing Administration

Joe L. Tilghman, Regional Administrator, Health Care Financing Administration

Thomas W. Lenz, Associate Regional Administrator for Division of Medicaid and State Operations

Health Care Financing Administration

Gary J. Stangler, Director, Missouri Department of Social Services

Missouri Department of Social Services

Gregory J Vadner, Director, Missouri Division of Medical Services

Missouri Division of Medical Services

Deerbrook Pavilion, L.L.C. is a Missouri limited liability company. It has no parent company and there are no publicly held companies that have a 10% or more interest in Deerbrook.

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Argument

Pursuant to Rule 15.8 of this Court's rules, Petitioner Deerbrook Pavilion, L.L.C., submits this supplemental brief to call to the Court's attention *United States v. Mead Corp.*, ___ U.S. ___ (No. 99-1434, June 18, 2001). The Petition for Writ of Certiorari (the "Petition") in this case was filed June 20, 2001. By the time the *Mead* opinion was issued on June 18, the Petition had been finalized and was being printed, so Petitioner could not include in the Petition a discussion of *Mead*.

Mead is directly relevant to the first question presented in this case: "What deference must courts afford to unpublished, internal agency memoranda interpreting statutes or regulations enforced by that agency?" The Eighth Circuit gave "great deference" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to an unpublished internal memorandum from Anthony Tirone, an employee of the Health Care Financing Administration. Petitioner argues in the Petition that this memorandum is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), not *Chevron*.

Mead resolves the deference issue. The Court held that a tariff classification ruling by the United States Customs Service is not entitled to *Chevron* deference but is "eligible to claim respect according to its persuasiveness" under *Skidmore*. *Mead*, Slip op. at 1. Under *Mead*, *Chevron* deference is appropriate only when Congress has "delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." Slip op. At 7. The Tirone memorandum plainly fails under this test.

The informal, unpublished, internal Tirone memorandum (set out in the Petition at A-31 to A-38) bears no resemblance to a rule carrying the force of law. It was not promulgated pursuant to notice-and-comment procedures, and there is no evidence that HCFA sought or received any comments or input on it. Indeed, there is no evidence that the Tirone memorandum even reflects the agency's interpretation of the statutes and regulations, rather than Mr. Tirone's own personal interpretation. *Mead* makes clear that the Eighth Circuit should have analyzed the Tirone memorandum under *Skidmore*, not *Chevron,* standards.

Given the *Mead* opinion, the Eighth Circuit panel decision in this case - giving "great deference" to the Tirone memorandum - cannot stand. Petitioner suggests that the mandate from this Court be the same as in *Mead*. Therefore, Petitioner asks the Court to issue the Writ of Certiorari, vacate the judgment of the Eighth Circuit, and remand the case for further proceedings in light of and consistent with *Mead*.[1]

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[1] *Mead* is not directly relevant to the second question presented in the Petition, but Petitioner continues to believe that question merits certiorari as well. Should the Court grant certiorari on the second question, no remand would be necessary and this Court could decide it on the merits.

Respectfully Submitted,

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